No. 17362

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FAYE LYONS,

Appellant,

vs.

ELSINORE MACHRIS GILLILAND, also known as ELSINORE MACHRIS GILLILAND,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

PAGE

Statement of the pleadings and facts 1

Statement of the case on appeal 2

Argument 5

Appellant's brief establishes a record which fully supports the verdict and judgment 5

Answer to appellant's argument relating to "propensity" 8

Summary of the evidence relevant to this appeal, and the law applicable thereto 10

Conclusion 17

TABLE OF AUTHORITIES CITED

Cases	Page
Brewer v. Simpson, 53 Cal. 2d 567	11
Grainger v. Antoyan, 48 Cal. 2d 805	11
Larrick v. Gilloon, 176 Cal. App. 2d 408	16
Miller v. Hassen, 182 Cal. App. 2d 370	11, 18
People v. Hickie, 179 Cal. App. 2d 823	10
Peterson v. Exum, 283 F. 2d 499	11, 17
Primm v. Primm, 46 Cal. 2d 690	11

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Appellee.

APPELLEE'S BRIEF.

Statement of the Pleadings and Facts.

Appellant, as plaintiff, brought an action against the Appellee, as defendant. Her complaint contained several causes of action in each of which she prayed for damages from the Appellee, in excess of $3,000.00, exclusive of interest. In the first trial of the action, a final judgment was rendered against the Appellant and for the Appellee on all of the causes of action pleaded in the complaint except one, the second cause of action. Although a judgment for Appellee had been entered on the second cause of action, the trial court granted a new trial thereof.

The second cause of action pleaded an alleged libel of Appellant by Appellee, assertedly arising out of a publication in a cross-complaint for divorce, filed by the Appellee against her husband, in the Superior Court

of the State of California, in and for the County of Riverside. In said cross-complaint Appellee's husband was charged with having committed adultery with Appellant.

In the second trial of the said second cause of action, —a trial by Jury—a verdict was returned against the Appellant and in favor of Appellee, and a judgment was entered thereon. From said judgment the Appellant has taken this appeal.

Statement of the Case on Appeal.

The issue on this appeal is: Was there, in the jury trial, evidence introduced by which, believing the same, the jury could find (as they did) that Appellee's defense of privilege had been sustained thereby.

The Appellee had pleaded in her answer to Appellant's complaint, among other things, that she was entitled to the privilege provided by Section 47 of the California Civil Code, relating to judicial proceedings for divorce. The jury's verdict was for the Appellee, upon her defense of said privilege.

The only two specifications of error which Appellant asserts and upon which she relies are: that there was insufficient evidence to justify the Jury's findings (1) that Appellee acted without malice and (2) that Appellee had reasonable and probable cause for believing the truth of the said allegations.

In Appellant's Opening Brief, she has cited evidence, which serves to refute her claims that there was insufficient evidence. The evidence so cited is, in fact, more than ample to sustain the findings and the verdict of the Jury, and the judgment entered thereon. Appel-

lant states that the only evidence concerning lack of malice is the testimony of Appellee [Rep. Tr. p. 298, line 7, to p. 299, line 21] that she had no ill will or malice towards Appellant when she made the allegations in her divorce cross-complaint. Who would know better? Yet Appellant asks the court to cast aside and ignore the testimony of Appellee, who was a witness in the Court trial subject to examination and cross-examination, and in lieu thereof, casually to infer that malice most likely existed.

Appellant's attempts to support her argument that Appellee did not have reasonable cause to believe the truth of the alleged libelous publication, by the statement of the witness, Blanche Lampert. Appellant asserts that the only knowledge of Appellee upon which she based her allegations was received by Appellee from the witness Blanche Lampert, at the time the latter made the statement hereinafter set forth.

Blanche Lampert stated that Appellant went to Scottsdale, Arizona, from Miami, Florida, at the solicitation of Appellee's husband; that upon and after Appellant's arrival in Scottsdale, she and Appellee's husband, Ray Gilliland, associated together at the latter's home, during a period of several months; that they remained together in said home almost every night, and drank together and became intoxicated at late hours, almost every night; that they took trips together and stayed all night together in the Paradise Valley Guest Ranch.

From the foregoing substantial and damaging evidence alone, a Jury could hardly do otherwise than find that Appellee had reasonable and probable cause for believing the truth of her allegation, and made them with-

out malice, at the time she pleaded in her cross-complaint that her husband had committed adultery with Appellant.

The evidence above summarized is substantial, clear and (as the Jury found) convincing. The only evidence at the trial, relating to the question of malice, was that Appellee acted without malice. There was no evidence that Appellee acted with malice.

The evidence of the association and conduct of Appellant and the husband of Appellee certainly cannot be said, by any stretch of the imagination, to provide reasonable and probable cause for believing otherwise than as Appellee believed.

The Jury performed its functions in the manner provided by law; it was fully instructed as to its duties and in the law, by the trial Judge; it considered and weighed all the evidence in the case, and then returned a verdict against the Appellant and in favor of the Appellee. Insofar as the decisions upon the evidence relating to the facts in the case are concerned, Appellant has had her day in court.

Appellant herself, by citing the foregoing evidence is now estopped from arguing further that there is no evidence in the case sufficient to support the Jury's verdict.

ARGUMENT.

Appellant's Brief Establishes a Record Which Fully Supports the Verdict and Judgment.

Appellant declines to accept and deal with the basic principles and rules of law which apply here and which constitute an insurmountable barrier to any further prosecution of her claims against Appellee. These principles are, that the decisions to be made upon the facts are the sole responsibility of the Jury, evidence is adduced, as it was, in abundance, both on behalf of the plaintiff and on behalf of the defendant, and the same is received in evidence, the determination of the effect of such evidence, in establishing the true facts as to whether or not the plaintiff has proved her claim and as to whether or not the defendant has made proof of her defense thereto, rests solely with the Jury.

In the matter of this appeal the basic question is whether or not there was evidence adduced at the trial from and upon which the members of the Jury could determine (as they did) that the Appellee, in making the allegations in her divorce cross-complaint did so without malice toward the Appellant and had reasonable and probable cause for believing the truth of the allegations. The record is replete with evidence directed to these issues. They were, perforce, the vital question upon the determination of which the case must be decided, the verdict returned and the judgment entered.

By the very nature of the case, the crucial evidence was that which related to the association of the Appellant with Ray Gilliland, the Appellee's husband, and their conduct when together.

The evidence (which will be cited hereinbelow in more detail) established an association and continuing conduct which were definitely unconventional. The evidence of what they did, when together, established continuing conduct which is generally considered to be contrary to, and in violation of accepted social conventions, customs and standards of behavior. In addition to the many unconventional situations in their association actually observed and concerning which testimony was introduced in evidence, there were many other items of evidence statements relative to the frequent opportunities available to them for their being alone, and of times when they were known to have been together entirely by themselves.

The testimony regarding their association and conduct included a protracted motor trip which provided stops for night lodgings along the way [Rep. Tr. p. 218, lines 1-3; p. 75, lines 5-11; p. 77, lines 10-19; p. 80, lines 8-20; p. 89, lines 7-19; p. 91, line 8, to p. 93, line 11]. Testimony as to their conduct in the presence and observation of other people disclosed drinking bouts, arguments, quarreling and fighting with one another and even slapping each other when one or both of them had been drinking. All of these things constitute the indicia and circumstances commonly associated with misconduct. They certainly are not the indicia of rectitude and virtue.

From these established facts of Appellant's and Gilliland's association and their conduct, which affair was

one of a series of affairs Appellee's husband had carried on at his Scottsdale home and the neighboring guest ranch [see Rep. Tr. p. 223, line 29, to p. 225, line 23] the Jury, after due deliberation, found that Appellee, as a reasonable person, acting without malice, had sufficient cause and reason to believe the truth of the allegation made by her in her cross-complaint for divorce. For Appellee, under these circumstances, to have believed otherwise would have indicated an unusual and unlikely naiveté.

Appellant's association and conduct with Appellee's husband, by reason of their marriage, were matters of direct and vital concern to Appellee. She was no mere casual busybody or scandalmonger. As Gilliland's wife she was directly and personally involved. The association affected her existing marriage relationship. The nature and character of her husband's relations with Appellant were such that most wives would believe their husbands were guilty of misconduct that amply provided a wife with legal grounds for divorce.

Appellant was not a child. She was an adult, and a twice previously married woman [Rep. Tr. p. 52, lines 7-8, and p. 53, lines 9-10]. The situation with which Appellee was so vitally concerned, was created entirely by Appellant's own conduct in associating herself with Gilliland. Appellee, quite naturally, was concerned with Gilliland and with his conduct. Appellant deliberately associated herself with Gilliland, in an intimate and prolonged relationship. The Appellee had no personal acquaintance or concern with the Appellant. It was by Appellant's own choice and her own conduct that she made herself the "other woman" in the divorce case. This is no proof of "malice" on the part of Appellee.

Yet Appellant, in her brief, asks that "malice" be inferred and that the undisputed testimony of Appellee, that she made her allegations in her divorce cross-complaint, without any personal acquaintance with, or ill will or malice toward the Appellant herein, now be disregarded and ignored. It may not be disregarded or ignored because of the fact and the record herein that the Jury has resolved and determined the question of malice and has found against Appellant's contentions.

This determination of the facts having been made by the Jury, in the exercise of its exclusive function of determining facts, and upon due deliberation and consideration of the entire record of the case (which included all of the above matters presented herein) and a verdict having been rendered thereon, the said verdict becomes a final and conclusive determination of all issues and conflicts of facts and must be considered fully qualified for acceptance by both trial and any reviewing courts.

Answer to Appellant's Argument Relating to "Propensity."

Appellant's opening brief states that: "The record is silent on the point of propensity on the part of Appellant." (App. Op. Br. p. 9).

The issue of propensity is irrelevant. Upon this appeal there is no issue or question of adultery involved. As stated heretofore, the only issue upon this appeal is,—was there evidence to establish the Appellee's defense of "privilege"?

In spite of its irrelevance Appellant has chosen to argue the evidence of "propensity". The statement

that the record is silent on this matter of propensity, however, is a completely incorrect statement.

The facts are these: That all of the evidence pertaining to Appellant's association with Ray Gilliland, contained proof relevant to her propensity for the conduct involved.

For example, such testimony as: she admitted that she stayed overnight in a hotel with Ray Gilliland in rooms that had connecting doors [Rep. Tr. p. 75, lines 5-11 and p. 79, lines 8-16]; she testified, "that it didn't make any difference * * * whether the rooms in the motels and hotels," that she, and Mr. Gilliland occupied had interconnecting doors or not [Rep. Tr. p. 120, lines 11-17]; that she took an automobile trip with Gilliland from Scottsdale, Arizona to Miami, Florida, of from seven to ten days, and they stayed overnight in the same hotels and motels along the way, the names of most of which she could not remember [Rep. Tr. p. 75, lines 5-11; p. 77, lines 10-19; p. 80, lines 8-20; p. 84, lines 7-19; and p. 91, line 8, to p. 93, line 11].

Appellant testified she did not know how they registered at the Fort Worth Hilton Hotel [Rep. Tr. p. 83, lines 5-10].

There was evidence that Appellant permitted Gilliland to stay all night with her in her room at the Paradise Valley Guest Ranch [Rep. Tr. p. 221, line 3, to p. 222, line 6].

There was evidence that she accepted money from Gilliland [Rep. Tr. p. 227, line 13, to p. 228, line 20]; also an airplane ticket [Rep. Tr. p. 102, lines 16-18].

This evidence and additional evidence of similar conduct set forth herein, in more detail, goes directly to the establishment of the "propensity" on the part of Appellant, concerning which she argues: "the record is silent. . . ."

Summary of the Evidence Relevant to This Appeal, and the Law Applicable Thereto.

The well established law is that it is the trier of the facts, (in this case the Jury) who has the sole responsibility and duty of determining and deciding conflicts of evidence. Where, as here, a verdict of a Jury is attacked on the ground of insufficiency of the evidence, the sole duty of the reviewing Court is only to examine the record and see if there is substantial evidence, contradicted or not, which supports the Jury's verdict. The reviewing Court is not charged with the duty of weighing the strength or persuasiveness of conflicting evidence. The reviewing Court's duty begins and ends with the determination of whether there is substantial evidence in the record, which if believed, supports the verdict.

In *People v. Hickie,* 179 Cal. App. 2d 823, 827-828 (1960), the court said:

> "It is, of course, for the trier of fact to determine the weight to be given to the opinion of an expert witness . . .; it is the exclusive judge of the effect and value of the evidence . . . and the credibility of witnesses . . . , lay and expert . . .; and it has the primary function of resolving factual conflicts . . .
>
> "Where findings are attacked on the ground of insufficiency of the evidence, the power of the re-

viewing court begins and ends with the determination of whether there exists in the record substantial evidence, contradicted or not, which will support the same . . . and if there is, the strength of opposing evidence or inferences is immaterial, for evidence is not weighed on appeal . . .

"Likewise, we are bound to liberally construe the findings in support of the judgment indulging in all reasonable inferences, resolving every substantial conflict in the testimony and construing any uncertainties in their favor."

The foregoing doctrines are so firmly established that they have become legal maxims.

Peterson v. Exum (1960-9th Cir.), 283 F. 2d 499, 502;

Primm v. Primm (1956), 46 Cal. 2d 690, 693;

Grainger v. Antoyan (1957), 48 Cal. 2d 805, 807;

Brewer v. Simpson (1960), 53 Cal. 2d 567, 583;

Miller v. Hassen, (1960), 182 Cal. App. 2d 370, 376.

At pages 10 to 26 inclusive of Appellant's Opening Brief there is set forth the "Statement of Blanche Lampert" plaintiff's Exhibit 8 [Rep. Tr. p. 306, lines 11-12]. Appellant asserts that said statement contains the only information known to Appellee concerning the association of Appellant and Ray Gilliland, husband of Appellee, and was the information upon which Appellee relied when she filed her divorce cross-complaint, which contained language alleged by Appellant to be libelous. This was not the only information upon which appellee relied although appellee was well aware of all

of these facts, as well as of additional facts concerning Appellant's conduct with Appellee's husband. However, these facts set forth by Appellant in her Opening Brief are, in and by themselves, so convincing that when they were presented to the Jury, these facts completely refuted Appellant's argument to the Jury that the evidence was not sufficient to establish the fact that Appellee had reasonable and probable cause for believing the truth of her said allegations. The pertinent excerpts from the "Statement of Blanche Lampert" made on November 2, 1955, are as follows:

> "Q. How long have you worked for Mr. Gilliland? A. We were there from the 1st of May until the last of September.
>
> Q. Of this year? A. Yes, . . .
>
> Q. How often would Mr. Gilliland have guests at his home when Mrs. Gilliland was around, were they ever there alone that you know of? A. Oh, sure, he had Faye Lyons from Miami . . ." (Appellant's Op. Br. p. 16.)
>
> "Q. What have you observed as to women being there? A. Well, Faye Lyons.
>
> Q. And when was that approximately? A. Well, let's see—in May when we first went there, I will tell you how I know it was before we went on our vacation and Faye was there, he was keeping her at that time up at Paradise Valley, because I cooked a steak dinner for them, Paradise Valley Guest Ranch.
>
> Q. Just tell us what you observed. A. He got mad at Judge Blake and Phil Kent and all of them, and he went and stayed all night up there himself.

Q. Up where? A. At Paradise Valley, when Faye was there. She used to come down and stay until two and three o'clock in the morning. They used to sit in there and drink together and we was in our own bedroom out there, they were in there until two or three o'clock in the morning, then they went on a trip and came back.

Q. Who went on a trip? A. Mr. Gilliland and Faye, I don't know where they went, but anyway when they came back they brought Faye's boy back with them and it didn't work, and they got in a fight and Ray slapped her and she throwed a glass at him, Faye broke a glass on him.

Q. After they came back with the boy did she live there at the house that you know of? A. No, she took the boy up to Paradise Valley, only she was down there every day and I baby sat with the boy, or one of the neighbors did.

Q. Until what hour of the morning? A. Until two or three o'clock.

Q. Was BL ~~she~~ intoxicated? A. Sure.

~~Q. Both of them?~~ BL ~~A. Sure.~~

Q. Any other instances? A. Yes, then—

Q. Now, before we get away from here, what period of time would you say approximately that this woman was involved? A. Oh, from May until I would say June, she was here most of the summer. . . ." (Appellant's Op. Br. pp. 17, 18, 19.)

The Appellant, by reason of her acts of associating with Appellee's husband, being kept by Gilliland at the motel, staying all night with him, drinking with him

every night, fighting with him when drinking, and going alone on a trip with him, in the Jury's opinion, gave Appellee reasonable and probable cause for believing the truth of the allegations Appellee made in her divorce cross-complaint.

At the trial of the action Mrs. Lampert corroborated her statement above cited. She testified that the Paradise Valley Guest Ranch was a form of a motel near Gilliland's home [Rep. Tr. p. 217, lines 11 to 18]; that the trip that Appellant and Gilliland took together was from Scottsdale, Arizona to Miami, Florida [Rep. Tr. p. 218, lines 1-3]; that Gilliland and Appellant were alone at Gilliland's home almost every night until 2 or 3 o'clock in the morning and that she saw them drinking together [Rep. Tr. p. 220, lines 11-13]; that Gilliland stayed with Appellant all night at the Paradise Valley Guest Ranch [Rep. Tr. p. 221, line 3, to p. 222, line 6]; that she saw him come out of Faye Lyons' room about 8 o'clock the next morning [Rep. Tr. p. 222, lines 1-6]; that Appellant had a fight with Gilliland and threw a glass at hime [Rep. Tr. p. 222, line 7, to p. 223, line 20]; that Gilliland boasted of his affairs with women and said that he wouldn't have them around if he "couldn't do anything" . . . he "wanted with them" [Rep. Tr. p. 225, line 18]; that Gilliland had affairs with other women (which showed Gilliland's propensities to the adultery charge) [Rep. Tr. p. 229, line 12, to p. 233, line 20]; that the witness saw Gilliland kissing Faye Lyons two or three times [Rep. Tr. p. 234, lines 4-6]. She also testified that she told Mr. Murphey, Appellee's attorney, about the girls who stayed with Gilliland and what they did and all of the other facts she related as a witness [Rep. Tr. p. 235, lines 4-7].

Mr. William L. Murphey, a lawyer representing Appellee, Mrs. Gilliland, talked to the witness Blanche Lampert in 1955 and at that time the witness, Blanche Lampert, told Mr. Murphey in substance what she testified to at the trial [Rep. Tr. p. 268, line 16, to p. 269, line 25]. Mr. Murphey related all of these facts to Appellee [Rep. Tr. p. 271, line 25, to p. 272, line 11]; and he told Appellee his opinion of the inference that could be drawn from these acts of Gilliland. He advised his client that in his opinion said acts of Gilliland and Appellant were of such gravity as to constitute sufficient grounds upon which to charge adultery [Rep. Tr. p. 275, line 17, to p. 277, line 6].

Appellee, Mrs. Gilliland, testified that her information concerning the conduct of her husband with Appellant came from the witness Blanche Lampert and from her attorney, Mr. Murphey and her Scottsdale neighbors [Rep. Tr. p. 299, line 22, to p. 300, line 11].

The evidence of the witnesses as to the affair between Appellant Faye Lyons and Appellee's husband, Ray Gilliland, was corroborated in most parts by the Appellant herself. She testified that Gilliland took her to the Paradise Valley Ranch House which was a little farther than three or four hundred feet from Gilliland's home [Rep. Tr. p. 70, lines 4-20]; that she knew that she should not be alone with Gilliland [Rep. Tr. p. 72, lines 6-10]; that if she did so she would be subjecting herself to something very unsavory [Rep. Tr. p. 72, lines 3-7]. The Appellant further admitted that the trip she took with Gilliland, testified to by the witness Blanche Lampert, was a ten day automobile trip from Scottsdale, Arizona to Miami, Florida, during which time she was alone with Gilliland and stayed at

many hotels and motels with him [Rep. Tr. p. 75, lines 5-11; p. 77, lines 10-19; p. 80, lines 8-20; p. 84, lines 7-19; p. 91, line 8, to p. 93, line 11].

In spite of all of this evidence which was presented to the Jury during the trial, Appellant on page 29 of her Opening Brief, states that "there is not sufficient evidence to support the plea of privilege as a matter of law . . ."

The Jury disagreed with Appellant. It considered the evidence sufficient to establish privilege on the part of Appellee. The jury believed that the facts were such as to give Appellee reasonable and probable cause for believing the truth of the allegations she made.

After all of the evidence was adduced at the trial, it became the right and duty of the Jury to decide whether the accusations made by Appellee were privileged. In *Larrick v. Gilloon,* 176 Cal. App. 2d 408, 418 (1959)—a libel action—the court instructed the Jury as to the meaning of probable cause, as follows:

> "Probable cause means that the defendant was in possession of facts which would have led a reasonable person so situated to entertain an honest belief maintained in good faith that the statements made were true. Whether the defendant was thus actuated by actual malice and whether he had probable cause to believe and did in good faith believe the defamatory statement to be true are questions of fact for the jury."

The above stated rule of law was applied to the facts in this case, by the Jury, after receiving instructions thereon from the trial Court. As was its right and duty, the Jury duly considered and weighed all of the facts

hereinabove set forth. From and upon said facts the Jury determined that Appellee had reasonable and probable cause to believe the truth of the allegations of misconduct made in her cross-complaint for divorce.

The Appellant does not deny the facts—she admits them. Her only complaint is that the Jury gave too much weight to these facts. This, however, does not constitute a proper ground for appeal because the Jury is the sole judge of the weight of the evidence.

The law relating to verdicts of a jury in federal court actions is accurately and concisely set forth in *Peterson v. Exum* (1960, 9th Cir.). 283 F. 2d 499, 502, as follows:

> "It must be borne in mind that in actions at law under federal diversity jurisdiction the Seventh Amendment guarantees a right to trial by jury. Preservation of that right requires that questions of fact be left to the jury and that findings of fact by a jury be left undisturbed unless reasonable men must conclude that there is insubstantial evidence in their support."

Conclusion.

Appellee has established by clear and substantial evidence, to the satisfaction of the Jury and the Trial Court, that the allegations contained in her divorce cross-complaint were a privileged publication. The verdict of the Jury and the judgment thereon in her favor were proper in every respect. Appellant's argument is untenable, particularly in the light of all of the facts in the case, including her own admitted conduct. Since many of the facts relied upon by the Jury were pointed out by the Appellant herself, the Appellant is

estopped from complaining of the Jury's determination of the weight given to these facts.

Appellant herein has failed to comply with the requirements and to meet the test of the firmly established rule, stated in *Miller v. Hassen* (1960), 182 Cal. App. 2d 370, 376, that

> "The contention that findings lack evidentiary support 'requires defendants to demonstrate that there is no substantial evidence to support the challenged findings.' "

We submit that upon the record, and for the reasons presented herein, the appeal should be denied.

Respectfully submitted,

LARWILL & WOLFE,
Attorneys for Appellee.